PAUL TENG KIM HWA

v.

LIM SHOON KOK

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[CIVIL SUIT NO. K 512 OF 1984]
20 MARCH 1985

CONTRACT: *Accountability of money had and received.*

COMPANY LAW: *Fiduciary position of a director to account for money received.*

The plaintiff/respondent was asked by his friend, the defendant/appellant, who was the Director and Chairman of M/s. Century Housing Developers Sdn. Bhd. ("the Developer") to take one unit of the houses he was then developing at a site called Taman Century ("Taman Century house").

By some special arrangement, payment of the Taman Century house was made to the appellant. As the Developer had not received the purchase price, the transfer of the Taman Century house was not effected to the respondent. The respondent now claims for the return of his money from the appellant.

Held:

[1] From the evidence, there was an agreement of the sale and purchase of the Taman Century house, although it was the Developer who had not completed the execution of the agreement, as relationship had soured. The issue as regards the purchase of Taman Century house was only important as a factor to determine the reason behind the respondent making the payment to the appellant.

[2] As the appellant's statement of defence and his affidavit in reply contradict each other and the appellant during the course of the hearing could at no time give the Court details of the alleged loan which was the supposed explanation for the payment by the respondent, the appellant's statement of defence was a sham. Money was admitted to have been received by the appellant. The respondent was not getting what he paid for. Therefore it was only right and proper that he was entitled to its return.

[Judgment for the respondent.]

*Per curiam***:** "The appellant being the Director and Chairman of the Developer....stood in a fiduciary position to the Developer and was...trustee of the purchase money paid to him by the respondent. He was duty bound to account, keep and pay over the respondent's money to the Developer."

Legislation referred to:
Rules of the High Court 1980, O. 18 r.19

For the plaintiff/respondent - Albert Tokuzip; M/s. Tokuzip & Co.
For the defendant/appellant - David Wong; M/s. Nicholas Fung Wong & Co.

JUDGMENT

Abu Mansor Ali J:

In his statement of claim the respondent claims the return of US$103,451.89 or its equivalent of RM241,922.24 and the usual statutory interest. How he came to have paid the appellant, he alleges, is well set out in para. 1 to 10 of the said statement of claim. In brief, the Respondent was asked by the appellant, his friend, who happened to be the Director and Chairman of M/s. Century Housing Developers Sdn. Bhd., (hereafter referred to as the "Developer") to take one unit of the houses he was then developing at a site called "Taman Century" (hereinafter referred to as "Taman Century house") Kota Kinabalu. The respondent states by some special arrangement between the parties the payment of the Taman Century house (the receipt of which was at first denied by the appellant) was made to the appellant (instead of to the Developer). As alleged the respondent paid it into the appellant's account in Singapore.

When the respondent asked for the transfer of the Taman Century house by the Developer, the Developer did not effect the transfer since the Developer had not received the purchase price and since this has not been effected the respondent therefore now claims for the return of his money from the appellant.

In his statement of defence in particular para. 4 of the statement of defence the appellant denied he ever received the money. In para. 5 of the said defence he alleged that as the house then was only 70% - 75% completed it was unthinkable that the respondent would have paid for the cost of the whole house and some renovation and further since the agreement to purchase was with the Developer it was also, he alleged, unthinkable that the respondent would pay the appellant the cost of the house. Since the appellant, as he alleges, never received payment he therefore refused to refund the money.

On 22 November 1984, the respondent took out a Summons-in-Chambers praying for an order that the appellant's defence be struck out under O. 18, r. 19, of the Rules of the High Court 1980, on the ground that it discloses no reasonable cause of defence, that they are scandalous frivolous and or an abuse of the Court and prayed for final judgment to be entered against the appellant.

On 16th January 1985 after hearing arguments in Chambers I ordered that the defence of the appellant particularly para. 4 and 5 be struck out as sham defence and an abuse of the process of the Court and I consequently ordered judgment be entered for the respondent. The appellant now appeals against this decision.

In my view the issue as regards the purchase of the Taman Century house from the Developer was only important as a factor to determine the reason behind the Respondent making the payment. To that end I find the agreement to sell is clear and I made a finding of fact that there was in fact an agreement to sell by the Developer. To prove this there was in the execution of a Sale and Purchase Agreement in early February 1983 as stated in Para. 5 of the statement of claim. Further I accept as a fact that the Developer or his lawyer led the respondent up the garden path by making the respondent sign his part of the purchase agreement for the **land only** but there was a change of mind and the Developer never completed the same. This is evidenced in "LSK1" of the affidavit of the respondent sworn on 2 January 1985, but it was the Developer who did not wish to complete as relationship had soured although the Respondent had completed his part of the agreement by signing the said "LSK1" first. The totality of the evidence points to the situation there was no doubt at all that there was an agreement to sell and to purchase the Taman Century house.

In this case I must be careful not to be sidetracked too much into the issue of the agreement to purchase the Taman Century house from the Developer which can cloud the most relevant and material issue which was to decide whether payment was in fact made by the respondent to the appellant. If one were to look closely we will realise the only issue in this case is in fact to determine whether the appellant did receive the amount alleged to be paid to him and was there reason for respondent to make the payment. In both the answer is in the affirmative. In para. 4 of his statement of defence the appellant totally denied he ever received that amount. It can be said his defence wholly hinged on it while in Para. 4 of his Affidavit-in-Reply sworn on 2 January 1985, in opposition to the respondent's Summons-in-Chambers application he averred (I quote):

> 4. The agreed purchase price of Ringgit Two Hundred and Twenty Thousand (RM220,000) is admitted.

Then further in para. 8 of the said affidavit the appellant said (I quote):

> 8. The sum of US$103,451.89 was not paid to my account in Singapore for the alleged purchase of the house and the alleged renovation works. **It was paid to me as a repayment of the loan I had given to the Plaintiff.**
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> (The emphasis is mine in order to show the shift in the appellant's position)

It can now be seen that the appellant had shifted from total denial he ever received this sum of money from the respondent to admitting that he received the same but not for the purchase of the Taman Century house and/or renovation. He sought to explain it away by saying it was a loan given to him.

During the course of the hearing theappellant at no time could give the Court the details of the alleged loan such as when it was contracted, the amount, and, if any, the documents involved. In fact the Court find as a fact that the respondent (individually) had never borrowed from the appellant. In the appellant's further Affidavit-in-Reply sworn on 15 January 1985, the loan spoken of was not taken by the respondent in para. 6 but in fact the loan was between the appellant and the company, Bersatu Tyre Sdn. Bhd., a corporate body, in which respondent was a major shareholder. A point which needs stressing here is that whenever there was in the past a loan given by the appellant it was well documented and the details of which are quite clearly set out. In this particular case other than merely saying it was a loan the appellant failed to show any detail. Hence I disbelieve the appellant and rejected his contention and held the defence was sham. There was an apparent suggestion by the respondent's Counsel during the hearing in Chambers that perhaps the respondent may have made a mistake for not paying the Developer but paid the appellant instead. I disagreed that it was so. It must be remembered that there was absolutely no dispute concerning the sale of the Taman Century house to the respondent by the Developer although it did not come true. Nonetheless there was a sale and purchase agreement and that the appellant being the Director and Chairman of the Developer in my view stood in a fiduciary position to the Developer and was no doubt in my view trustee of the purchase money paid to him by the respondent. He was duty bound to account, keep and pay over the respondent's money to the Developer. I say therefore the payment was perfectly in order. It was appellant in my view who failed to account to the Developer of which he is Director and Chairman. For the reason stated above since I found the appellant's statement of defence was sham I therefore ordered that it be struck out and I consequently entered judgment for the respondent accordingly as prayed.

Before entering judgment I reminded myself of the many cases which state that to deprive the appellant of his defence would be a drastic step but each case must be decided according to its own merits and to me, with respect, it was clear in my mind and on settled authorities where it is clear and unarguable the Court must do its duty to have the defence struck out and to enter judgment. In my humble view this is one. Money was admitted to have been received by the appellant. The respondent was not getting what he paid for and to me it is only right and proper in my view that he was entitled to its return. Hence I order judgment for the respondent.

Also found at [1986] 1 CLJ 73